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In the Supreme Court of the United States

OCTOBER TERM, 1976

LUNDY PACKING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is reported at 549 F. 2d 300. The decision and order of the National Labor Relations Board (Pet. App. 3-69) are reported at 223 NLRB 139.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1977. Petitioner's request for rehearing *en banc* was denied on March 18, 1977. The petition for a writ of certiorari was filed on April 21, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that the employees' strike was caused by the employer's unfair labor practices.

STATUTE INVOLVED

The relevant provisions of Section 8 of the National Labor Relations Act, as amended, 61 Stat. 140, 73 Stat. 525, 542, 29 U.S.C. 158, are set forth at page 3 of the petition.

STATEMENT

In April 1974, employees at petitioner Company's hog slaughtering and processing plant in Clinton, North Carolina, began an organizational campaign on behalf of the Union[1] (Pet. App. 11). The Board found that the Company, during its active opposition to the campaign, violated the National Labor Relations Act by:

(1) discriminatorily discharging two union activists, Willard Chavis (Pet. App. 38), and Roy Wilson (Pet. App. 53);

(2) maintaining an overly broad no-distribution rule (Pet. App. 22);

(3) coercing employees through threatening statements in a speech given to assembled employees by Company President Lundy (Pet. App. 4-5, 20-21);

(4) coercively interrogating employee Ellen Raynor concerning the role played by certain fellow employees in the organizational campaign (Pet. App. 24);

(5) creating the impression that union meetings were under surveillance (Pet. App. 28).

In addition, the Board held that the Company violated Section 8(a)(3) and (1) of the Act by refusing to reinstate 44 striking employees who the Board found to be unfair labor

[1]Local 525, Meat, Food and Allied Workers Union, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO.

practice strikers (Pet. App. 63). The court of appeals, in a *per curiam* opinion, upheld the Board's decision, except for the finding that Company President Lundy's speech was unlawful (Pet. App. 2).

The Company here challenges only the Board's finding that the strike was caused by the Company's unfair labor practices and that therefore the striking employees were entitled to reinstatement upon their unconditional offers to return to work. The facts pertaining to this issue follow:

Union activist Willard Chavis, who had solicited some 75 of the Company's 300 employees to sign authorization cards for the Union, was discharged on May 24, 1974 (Pet. App. 28-29, 35-36; A. 94-97).[2] Chavis was convinced he was fired because of his union activities (Pet. App. 56; A. 134, 643-646, 896-897), and the Board subsequently so found (Pet. App. 38). Shortly after Chavis left the plant, Johnny Burgess, chairman of the employees' organizing committee, Roy Wilson, who was himself later discharged for his union activities, and other employees talked in the locker room about walking out in protest. Wilson said, "[W]e might as well walk out because * * * they [might] come at us like this one at a time." Burgess agreed but stated that the employees "can't go out now," as only one man had been fired. (Pet. App. 56; A. 471-473.)

Two weeks later, on June 6, the in-plant organizing committee met at Ellen Raynor's house. Raynor advocated a walkout because she had been questioned at the plant that day about a union meeting at her house on June 5, and she therefore feared that she would be fired (Pet. App. 56; A. 473-474).[3] On June 18, Wilson was discharged (Pet. App.

[2]"A." references are to the appendix in the court of appeals, a copy of which has been filed with the Clerk of this Court.

[3]The Board found that this interrogation violated Section 8(a)(1) of the Act (Pet. App. 22-24).

38). Like Chavis, he assumed he was terminated because of his union activities,[4] and he discussed these convictions with others before he left the plant (A. 532, 788).[5]

Thereafter, at a union meeting held on July 7 and attended by about 34 employees, a decision was made to strike in protest over the Company's conduct (Pet. App. 56-57; A. 430-431, 438, 441). The employees complained about unjust discipline for rule violations, harassment by supervisors, and constant pressure because of union activities (Pet. App. 56-57; A. 431-436, 442, 470-471).[6] Burgess argued that the employees should "take Mr. Lundy at his word because he said he had ways of finding out who signed union cards, and they had fired Willard Chavis and Roy Gene [Wilson], who was working for the union, and if Ules Jackson got fired * * *, we would walk out because they was coming at us one at a time" (Pet. App. 57; A. 442, 469-470). Chavis added that the employees would "have to fight for their rights or the Company was going to chop them all off until everybody in that plant * * * [who were] members of the union or working for the union" was replaced (Pet. App. 57 n. 73; A. 435). One of the Union's staff organizers stated that the employees appeared determined to walk out because of the discharges and the pressure upon them (Pet. App. 57; A. 432-434, 471). Burgess then proposed that, "if Ules Jackson was fired when he went to work on Monday, then [they

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[4]The Board so found (Pet. App. 53).

[5]On June 26, the Company also discharged another union activist, John D. Faison (Pet. App. 53-54; A. 353-354). The Board found, however, that he was fired for cause (Pet. App. 53-55).

[6]Before it fired Chavis and Wilson, the Company gave them a number of reprimands for faulty work which the Board found to be unjustified and issued for the purpose of supporting the Company's pretextual grounds for discharging the two employees (Pet. App. 31-32, 34, 35, 42, 45, 46).

would walk out because] they would know that the [Company's] intentions was to fire all of the union people until they were all fired * * *." By a unanimous vote, the employees agreed to that course of action (Pet. App. 57; A. 434-435).

Jackson was in fact discharged the next day, July 8, and approximately 20 employees walked out upon a signal from Burgess (Pet. App. 57; A. 471, 585).[7] Some strikers carried small handbills which declared (Pet. App. 57-58; A. 487-488, 1233):

> *This is our Protest!*
>
> Cuts in pay, reprimands, firings, murderous pressure, from the Company has left us no alternative!
>
> We are taking this method to inform the rest of the Lundy Workers, and the public.
>
> WE DON'T INTEND TO TAKE THIS TREATMENT ANY LONGER!
>
> Issued by: The Lundy Organizing Committee.

Picketing of the Company's premises ensued, at which the striking employees carried signs protesting "illegal discharges," "unfair treatment," "illegal harassment," and "unfair labor practices" (Pet. App. 58; A. 417, 1226, 1227, 1228, 1229, 1230, 1231). In the next two weeks, additional employees joined the strike, so that, by July 22, 44 employees were on strike (Pet. App. 58, 59; A. 1253).

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[7]In its first amended charge, the Union alleged that Jackson's discharge violated Section 8(a)(3) and (1) of the Act, but the complaint did not include this allegation (A. 4, 9). The Board found, however, that the Company violated Section 8(a)(1) when several of its supervisors approached Jackson and gave him the impression that the union meetings he had arranged were under surveillance (Pet. App. 26-27; A. 390-392).

On July 26, 1974, the Union's president submitted to the Company an unconditional offer, on behalf of all the striking employees, to return to work. The Company responded that it did not consider the employees to be unfair labor practice strikers and that it had "exercised [its] lawful right to permanently replace them." Later, each striking employee offered individually to return to work without condition. On August 12, the Company replied: "In exercising our right to treat you as an economic striker, we hired permanent replacements for all vacancies. Therefore, at the present time the Lundy Packing Company has no job available for you." (Pet. App. 60-61; A. 137-138, 1221, 1222.)

The Board, upholding the decision of the Administrative Law Judge, rejected petitioner's contention that the strike was caused by Jackson's lawful discharge and therefore was an economic, rather than an unfair labor practice, strike. The Law Judge stated (Pet. App. 61-62; footnote omitted):

> As reflected by the transactions at the July 7 union meeting, the immediate concern of the employees was that the Company was going to discharge the union supporters one at a time. Chavis, Wilson, and Faison already had been terminated and the employees were conscious of the fact that President Lundy had suggested that he had ways of finding out who had signed union cards. For reasons not disclosed in the record, the employees at the meeting feared that Ules Jackson might be discharged the next day and believed that if he was it would be because of Jackson's union activities. It was decided that should Jackson be discharged they would strike. Jackson was discharged and a strike was called. The strike thus was triggered by Jackson's discharge which has not been found to be unlawful. However, while the immediate impetus of the strike was Jackson's discharge, the proximate cause of the strike was the fear that Respondent had means of ascertaining who the union supporters were and would discharge them one at a time. This fear was generated by the Company's unlawful activities, found above, and by the series of discharges commencing with Chavis' termination on May 24 and including Wilson's discharge on June 18, both of which I find were unlawful. The strike therefore is an unfair labor [practice] strike.

The Law Judge concluded that the striking employees were entitled to reinstatement even though they had been permanently replaced (Pet. App. 63).

ARGUMENT

The Company concedes (Pet. 7) the long-settled proposition that unfair labor practice strikers are entitled to reinstatement even though permanent replacements were hired during the strike. *Mastro Plastics Corp.* v. *National Labor Relations Board*, 350 U.S. 270, 278. The sole issue raised by the petition is whether substantial evidence supports the Board's finding that the strike was caused by the Company's unfair labor practices and therefore that the striking employees were unfair labor practice strikers.[8] That

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[8] There is no merit to petitioner's contention that there is a conflict among the circuits concerning the appropriate standard to apply to ascertain the nature of a strike. The law is clear that, "[i]f there was a causal connection between the unfair labor practices and the strike, the striking employees are entitled to reinstatement." *National Labor Relations Board* v. *Birmingham Publishing Company*, 262 F. 2d 2, 9-10 (C.A. 5; footnote omitted.) Accord: *National Labor Relations Board* v. *Comfort, Inc.*, 365 F. 2d 867, 873-874 (C.A. 8); *Larand Leisurelies, Inc.* v. *National Labor Relations Board*, 523 F. 2d 814, 820-821 (C.A. 6); *National Labor Relations Board* v. *Cast Optics Corp.*, 458 F. 2d 398, 407 (C.A. 3), certiorari denied, 409 U.S. 850; *National Labor Relations Board* v. *Safway Steel Scaffolds Company of Georgia*, 383 F. 2d 273,

factual issue does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 487-488.

In any event, the record amply supports the Board's conclusion that the employees' fear that union supporters would be discharged one by one was the "proximate cause" of the strike. This fear was clearly justified in view of the discharges of Chavis and Wilson, the interrogation of Raynor, and the Company's comments concerning surveillance of union meetings, all of which were found to be unfair labor practices. The fact that Jackson's discharge and Lundy's speech—conduct found to be lawful—provided added incentive to strike does not require a different conclusion. There is no disagreement among the circuits that, where lawful and unlawful conduct results in a strike, the burden is on the employer to prove that the strike would have occurred irrespective of its unfair labor practices. See cases cited at note 8, *supra*, and Pet. App. 63. The Board properly found that petitioner did not sustain this burden here.

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280 (C.A. 5), certiorari denied, 390 U.S. 955; *National Labor Relations Board* v. *Sea-Land Service, Inc.*, 356 F. 2d 955, 965-966 (C.A. 1), certiorari denied, 385 U.S. 900; *National Labor Relations Board* v. *My Store, Inc.*, 345 F. 2d 494, 498 (C.A. 7), certiorari denied, 382 U.S. 927; *National Labor Relations Board* v. *Southland Cork Company*, 342 F. 2d 702, 707-708 (C.A. 4); *General Drivers and Helpers Union Local 662* v. *National Labor Relations Board*, 302 F. 2d 908, 911 (C.A. D.C.), certiorari denied *sub nom. Rice Lake Creamery Co.* v. *General Drivers and Helpers Union, Local 662*, 371 U.S. 827; *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. 2d 862, 872 (C.A. 2), certiorari denied, 304 U.S. 576. The cases cited by the Company (Pet. 8-11) adhere to this standard, notwithstanding the choice of words used to express it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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